



SECURITY ALTERNATIVES OF SEA WAYBILL AND STRAIGHT BILL OF LADING

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Abstract:

Apart from the traditional bill of lading, numerous shipping documents have emerged relatively recently trying to offer a satisfactory solution to the bill's crisis. Among them, sea waybills are very commonly used in contemporary transport operations, especially when bills of lading are not suitable and useful. In front of this development, many inquiries seem to arise, to which this article seeks to answer. In other words, the aim of this article is to analyse whether the sea waybill can provide security to lenders, such as banks, and to what extent. Answering to that question, the next inquiry is whether the straight bill of lading is tantamount to sea waybill or the traditional bill of lading, whatever this means regarding the legal implications, including, of course, the level of the furnished security.

Keywords:

Sea waybill, equitable pledge, NODISP, straight bill of lading

1. Sea waybill

1.1. Definition

The Economic Commission for Europe defines sea waybill as follows: 'A non-negotiable document which evidences a contract for the carriage of goods by sea and the taking over or landing of the goods by the carrier, and by which the carrier undertakes to deliver the goods to the consignee named in the document'. Similarly, the following definition is also to be cited by virtue of its comprehensive approach to the nature and features of the sea waybill.

'The sea waybill is a non-negotiable transport document and its great advantage is that its presentation by the consignee is not required in order for him, on production of satisfactory identification, to take delivery of the goods, thus avoiding delay both for him and the carrier where the goods arrive before the waybill. It is not a document of title but contains, or is evidence of, the contract of carriage as between the shipper and carrier in that it incorporates the standard terms of the carrier on its face. However, unlike a bill of lading, these terms are not detailed on the reverse of the waybill which is blank. A waybill is usually issued in the "received for shipment" form but may, like a bill of lading, be notated once the goods have been loaded'.

1.2. The emergence of the sea waybill

There are numerous reasons that have resulted in the emergence of the sea waybill. In a nutshell, the vessels' higher speeds have as a consequence the timely arrival of the goods at the port of discharge, while bills of lading are still en route. On the one hand, diminishing the time of the voyage is, of course, to be praised, but, on the other hand, it surely shook the shipping industry up. In essence, the shipping industry had to confront the violation of the presentation rule, because most times vessels used to arrive at the port of destination, but the production of the bill of lading was impossible. Shipping industry dealt with this issue by coming up with the idea that the delivery of the goods shall be feasible even though the bill of lading is not presented. In that case, the issue of a letter of indemnity by the consignee is essential. The restricted use of the bill of lading was also the corollary of containerization. This transport method brought remarkable changes, such as reduction in the speed of the transportation operations.

However, it must be noted that International Community did not remain passive spectator to the new tendencies, practices and commercial documents that were occasionally introduced. On the contrary, it reacted and responded to the new challenges by trying to enact a comprehensive and coherent legal framework regulating sufficiently the

nascent circumstances. As regards the sea waybill, the International Maritime Commission (CMI) sanctioned the Uniform Rules for Sea Waybills in 1990. It is noteworthy, though, that concerns and proposals expressing the urgent codification and legislation pertaining to non-negotiable documents, such as sea waybills, had already sprung up. Particularly, at the CMI Colloquium in 1983 one of the submitted suggestions, which had been keenly embraced, was related to the deterrence of the massive use of the bill of lading on the apparent ground that it is not always essential. Unlikely, the use of non-negotiable documents (i.e. sea waybill) should be motivated, because, under some circumstances, bills of lading are absolutely useless.

2. The qualities of the sea waybill

Besides the similarities between sea waybills and bills of lading (both serve as proof of receipt of the cargo as well as evidence of the contract of carriage), their role and practicality are remarkably different.

From a legal point of view, the features of the sea waybill differ significantly from those of the bill of lading. First of all, the former is not negotiable/transferable, since it is destined for a definite consignee, whose name is expressly written on its face. Normally, that single person has the right to receive the goods, once he has certified that he is the party entitled to have the goods received. Nevertheless, under few strict circumstances, the goods can be delivered to a different consignee than the named on the sea waybill. To elaborate more, the consignee is likely to be changed provided that he has not previously exercised his right to request delivery of the goods and on condition that this change is not barred in terms of the law governing the contract. Put simply, modification must be concurrently permitted, because otherwise, the fulfillment of one of the aforementioned requirements does not suffice.

Additionally, under a sea waybill contract of carriage, the identification of the consignee suffices for the delivery of the goods, because the sea waybill is not a document of title. At common law documents of title have to be produced against the carrier so that the latter proceeds to the physical delivery of the goods. Otherwise, the carrier is reluctant to hand over the goods and prefers to retain them by virtue of his liability in case of misdelivery. Indeed, the carrier confronts that risky situation with the most preventive measures, because he does not want to get involved in unenviable incidents, which would result in his liability.

In contrast, when it comes to the delivery of the goods in the context of a sea waybill contract, the carrier might be found liable when he has brought his obligation to exercise reasonable care at the time of the consignee's identification. Indeed, according to article 7 of the CMI Uniform Rules for Sea Waybills 1990, the carrier will be discharged if he delivers the goods to the consignee upon performance of appropriate identification, and if he proves that he has exercised reasonable care to ascertain that the party claiming to be the consignee is in fact the recipient.

3. It Can the sea waybill be regarded as a document of title?

The debate whether the sea waybill could be considered a similar document of title dates back to 1924, when the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules) was ratified. Undeniably, the phrase "any similar document of title", which is found under article 1(b), provokes mere uncertainty and ambiguity. But, which is, in fact, the real cause of the inquiry whether the sea waybill could be classified as a document of title?

In particular, the dispute's origins have to be searched out in the translation of the original French text to English. In the course of the translation procedure, a few literal discrepancies and inconsistencies came into being. The challenging task of an accurate rendition of the French text was nearly impossible taking into consideration the variances between the legal system of common law and civil law, respectively. In that case, the phrase 'similar document of title' which is entirely conceivable and plausible under common law, lacks legal essence and interpretation under civil law. Specifically, under continental law the phrase in question is apparently too obscure and evasive.

Confusion can also be caused by the interpretation of the section 1(4) of the Factors Act 1889, which provides: "The expression "document of title" shall include any bill of lading any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented". In terms of this wide definition, one may wonder whether a sea waybill could be considered a document of title falling under the above connotation. In order to answer that question as aptly as possible, the following subqueries have to

be previously posed. Firstly, whether the bailee, who has the immediate control of the goods, is supposed to give in the goods to whom they are destined and additionally what kind of rights does the former enjoy. Secondly, with regard to the nature of the document, whether it serves as proof of ownership or of power to control the goods.

All in all, although it is incontrovertible that the sea waybill is not a document of title, this does not imply that its holder is not capable of having the oversight of the goods during the voyage. The shipper is entitled to request redelivery of the goods until the time of their arrival at the place of delivery designated ad hoc in the contract.

4. EN Security provided by the sea waybill

Given that the sea waybill is not a document of title, its security role is rather debatable. The reason is that in comparison with the bill of lading, the use of sea waybills is accompanied by a quite limited range of functions confined to the two following: as evidence of a carriage contract and as a receipt of the shipment. Notwithstanding these common functions, the sea waybill cannot substitute the bill of lading by virtue of the fact that handing over the sea waybill does not result automatically in the transfer of the goods. This specific 'flaw' is pivotal for the inability of the sea waybill to supplant the bill of lading, because it does not signify the conveyance of the possession as well as of the property over the goods. Consequently, it is not suitable for documentary security either upon the purchaser's request or in favour of third parties beneficiaries, such as banks that enter into a transaction after they have issued a letter of credit or made any other similar arrangement. In the absence of its function as document of title, it is generally admitted that the sea waybill is not capable of providing security either for the seller or for the bank as efficiently as the negotiable bill of lading. The security alternative that is possible for a bank under a sea waybill contract is feasible only if the bank is named as consignee. Therefore, it follows that the security offered by waybills are available to a much lesser extent compared to that of the bill of lading.

Regarding the likely security role of the sea waybill, it is indisputable that it cannot serve as the legal basis of the pledge due to the lack of its function as document of title. One of the requirements of an effective pledge is the possession of the goods. According to the Black's Law Dictionary the definition of the pledge is the following: 'a bailment of goods to a creditor as security for some debt or engagement. A bailment or delivery of goods by a debtor to his creditor, to be kept till the debt lie discharged'. From this definition may not be deduced the linkage between the transfer of the document of title which automatically entails the transfer of possession and the right of pledge. Therefore a more detailed definition is to be subjoined. Specifically, pledge is a 'type of security which comprises of the delivery of possession of an asset as security until payment. Possession may be actual or constructive, for example, handing over the keys to the store where the pledged goods are kept. Ownership remains with the pledgor. The pledge confers on the creditor or pledgee a power of sale in the event of default'.

Under a sea waybill contract of carriage, the only alternative with respect to the security of third parties' interests is available under article 6 (2) (a) of the CMI Rules. Allotting to the shipper the right to qualify as consignee another person than the one, whose name is recorded on its face, is surely a protective provision for the benefit of the shipper. The latter has the supervision of the goods which, in fact, circulate under his auspices and subject to his reclaim. Consequently, he can hand the goods to a third party and exercise his right of estoppel.

The Uniform Customs and Practice for Documentary Credits Revision Number (UCP 500), which prescribe the capability of sea waybills to operate as security in the context of documentary credit transactions, have set some conditions, upon which the security is strictly dependant. First and foremost, sea waybills are adequate and completely competent to provide efficient security on condition that the shipper has relinquished both entitlements of stoppage in transit and changing the consignee, i.e. the bank, during the voyage.

To sum up, the only alternatives for securing the interests of a third party are either the right of redelivery of the goods or the set of a NODISP clause. Normally, NODISP clauses stipulate as follows: "By acceptance of this waybill, the Shipper irrevocably renounces any right to vary the identity of the Consignee of the goods during transit". Recently, the emergence of another clause named as the CONTROL clause is to be highlighted. In essence, the objective is much more the same with NODISP and it has the following wording: "Upon acceptance of this waybill by a Bank against a Letter of Credit transaction (which acceptance the Bank confirms to the carrier) the shipper irrevocably renounces any right to vary the identity of the Consignee".

5. Conventions, statutes and the sea waybill

In respect of the status of the sea waybill in international conventions, it must be noted that there is no common policy among the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. In particular, the sea waybill is excluded from the application scope of the Hague-Visby Rules, whereas Hamburg Rules do apply when a sea waybill is issued. The explanation is found in the fact that the Hague-Visby Rules adopt a “carrier-prone system”, whilst the Hamburg Rules as well as the Rotterdam Rules embrace the so-called “shipper prone” system.

Considering that, on the one hand, the Hamburg Rules have been ratified by a few countries, and on the other, that the Hague-Visby Rules do not apply in case of the sea waybill, it can be deduced that the conditions and the terms of a sea waybill contract are at the discretion of the carrier. To put it the other way round, in the absence of mandatory law (international conventions) sea waybills contracts are freely determined by the parties pursuant to the basic legal principle “freedom of contract”. However, governments and lawmakers can play a significant role in the legislative incorporation of the use of sea waybills into domestic law by enacting its statutory implementation. A typical example of legislating independently of International Conventions is the COGSA 1992. Under English law, the Hague-Visby Rules do not apply only to bills of lading or other documents of title, but also to sea waybills. In fact, Hague-Visby Rules were incorporated into English law through the enactment of the COGSA 1992, whose scope of application is wider covering both instruments, namely bills of lading and sea waybills, as well.

6. Measurement The straight bill of lading

A bill of lading, on the face of which the word “to order” is not written, is classified as a straight bill of lading. Under common law, the straight bill of lading is transferred by physical delivery in contrast to the shipped bill of lading, the valid transfer of which requires both endorsement and delivery. In addition, the particular type of bill of lading lacks transferability/negotiability. From all the above it follows that the straight bill of lading is not considered a document of title. But, what about the potentiality such a bill of lading (made out to a named consignee) to be qualified as a similar document of title within the meaning of article 1(b) of the Hague-Visby Rules and section 1(4) of the COGSA 1992? Remarkably, this dilemma has led to disunity and disagreement between scholars and jurisprudence. Gaskell, for example, is of the opinion that the straight bill of lading is not a document of title, while courts are deemed to incline to the contrary view, namely that straight bills of lading can be viewed as documents of title or, properly, that they are equivalent to that type of document.

The court’s verdict in *The Rafaela S* has altered the legal perspective regarding the status of the straight bill of lading. While the judgment was enough pioneering in view of the majority and dominant opinion at that time that the straight bill of lading was not considered a document of title, some points of criticism have to be pointed out. In *The Rafaela S* the court came to the conclusion that a straight bill of lading is indeed a document of title on the grounds that it has to be presented to the carrier, so that delivery of the goods is being held. That argument was actually the major one that raised doubts and disapproval of the court’s decision. Specifically, denunciation was mainly based on the fact that the court came to its conclusion that arguing that the delivery of the goods can take place only after the straight bill of lading has been presented. Considering the straight bill of lading as a document of title would actually mean that new documents which used to function only as a receipt of the goods, could now be regarded as documents of title. In other words, non-negotiable documents could be viewed and classified as documents of title expanding the true meaning and interpretation of the term evidently in the name of the facilitation of commercial practices. Moreover, as it is known, there are two requirements with regard to the transfer of the symbolic possession. The first one is indorsement and the second one is delivery of the bill of lading. But to what extent is the transfer of the possession by the aforementioned means applicable in the case of a straight bill of lading?

In *The Rafaela S* the court faced the dilemma whether the straight bill of lading is equivalent to the sea waybill by virtue of their common feature to write on the name of the consignee or whether does it fall within the same category as the original bill of lading and hence, to whatever is incidental. To elaborate more, it seems to be a division of the straight bill of lading in respect of its legal status under two legal frameworks, namely the COSGA 1971 and the COSGA 1992. Under the former it was equivalent to the bill of lading or any similar document of title, whereas under the latter it was much the same as the sea waybill.

7. Security provided by the straight bill of lading

As regards the potential security offered by a straight bill of lading, it is extremely deficient and inferior compared to the security provided by the shipped bill of lading. In general, the straight bill of lading is considered equivalent to the sea waybill and its legal status is closer to the non-negotiable sea waybill rather than to the traditional bill of lading. Of course, in the case of the straight bill of lading, there are a few alternatives through which security is feasible. The most practicable is the person, whose interests are protected, to be named as consignee which means that he will be the only one that can claim delivery of the goods. But, how about the possibility of the creation of an equitable pledge based on a straight bill of lading as long as the latter is not a document of title at common law?

Regarding the notion of equitable pledge, it is debatable whether it can legally exist or it is a concept absolutely irrelevant with the legal order. In fact, this dispute dates back to the middle of the twentieth. Specifically, in 1952 Paton wrote as follows: "In contrast with a mortgage, a mere pledge cannot be created without the delivery of the possession of the goods. A contract to deliver creates only an equitable interest which may be defeated by the claim of a bona fide purchaser for value". In fact, Paton appeared to advocate the idea of the equitable pledge by referring to the phrase "equitable interest", a view that was adopted by a portion of legal professionals, such as Lord Templeman in *Maynegrain Pty Ltd v Compafina Bank*, who spoke about the transfer of the pledge as conferring an "equitable interest" on the pledgee. However, the aforementioned view was criticised by scholars, such as Goode, who was of the opinion that the ideas of equitable possession and of equitable pledge are completely alien to law science. In agreement with Goode's standpoint is also the approach of Blackburn J and the reasoning of courts in many cases, such as in *Dublin City Distillery Ltd v Doherty*.

8. Sea waybill and straight bill of lading

It is rather simple to be confused between the straight bill of lading and the sea waybill. The former is also found in the literature as non-order bill of lading. This could result in severe confusion. For instance, courts may stand in favour of qualifying a non-order bill of lading as sea waybill by virtue of the non-record of the word "order" on the face of the bill of lading. Setting as single criterion whether the word "order" is written down or not, it may have practically significant consequences, which are not immaterial at all. Finally, the judgment regarding the qualification of the document as sea waybill or bill of lading is of great importance, because answers to subsequent questions and further legal implications differ accordingly. For instance, is the consignee obliged to produce the document at the final stage of delivery or what about the rights of suit? These are just a few questions which are attributed to the nature and the qualification of each document and which is not trivial at all.

9. Conclusion

To sum up, the straight bill of lading is much more equivalent to the sea waybill rather than to the traditional bill of lading. The *Rafaela S* might have approached the legal issue in question in a broad manner, but it did not seem to pave the way for subsequent cases, that dealt with the same problem. Considering, therefore, that these instruments have much more identical legal status, it is obvious that, for the time being, the straight bill of lading provides the restricted extent of security as exactly the sea waybill. Finally, it is not to be ignored that even the slight and seemingly insignificant distinction between sea waybills and straight bills of lading by virtue of the further legal implications.

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